BEFORE THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
COMMUNICATION 260/2002 - BAKWERI LAND CLAIMS COMMITTEE/CAMEROON

Response of The Bakweri Land Claims Committee to the Reply Presented by the Government of Cameroon on the Exhaustion of Local Remedies

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Table of Contents

The Bakweri Land Claims Committee (hereinafter "Complainants") hereby responds to the Reply of the Government of Cameroon (hereinafter "Respondent") filed on May 8, 2003, with respect to its Submission on Admissibility, filed on February 4, 2003, and its Response to the Government's Preliminary Objections, filed on March 4, 2003, relating to Communication No. 260/2002 pitting BLCC against the Government of Cameroon.

I. Summary

In its Reply dated 8th May 2003, Respondent sets forth two basic reasons why this Commission should declare the BLCC communication inadmissible. First, that the conduct of the Southwest Procureur General in the John Niba Ngu/Brobon Finex case ("CTE Litigation"), though illegal is insufficient to justify a conclusion that the courts in Cameroon are similarly tainted. To support the proposition that the Cameroon judiciary is independent, Respondent cites the *Ncho v. Itoe* case where the courts in the Northwest Province entertained a complaint against the Procureur General and found him guilty. With respect to this first issue, Respondent's argument fails, first, because it is based on a fictitious view of Cameroon justice and ignores both popular and expert assessments of a national court system that is notoriously corrupt and compromised. In addition, Respondent relies on case law that confirms Complainants' submission that the idea of an independent judiciary in Cameroon is nothing but a chimera.

Second, Respondent challenges the admissibility of this Communication on the ground that having failed to sue the Government of Cameroon in the latter's law courts, Complainants have not exhausted all available legal remedies within the meaning of Article 56(5) of the African Charter. This second argument also must fail for three reasons. First, because its construction of the language of Article 56(5) violates the *principle of textuality* codified in the **Vienna Convention on the Law of Treaties** and to which the text of the Charter must be subjected. Second, the rigid interpretation Respondent gives to the local remedies rule does not accord with generally accepted rules of international law which recognize not only judicial remedies but also any other domestic remedy that may provide redress in the circumstances of the case. Furthermore, the judiciary to which Respondent strenuously pleads should have first heard this matter is corrupt, overburdened, and not independent, and Respondent, by its conduct, is deemed to have tacitly waived this defense.

For all these reasons, Complainants request that the objections to the admissibility of this Communication be denied and that the Commission advise Respondent to file its counter-memorial on the merits.

II. Argument

1. Independence and Impartiality of Judiciary

The rule of law presumes that in a healthy society, judicial power will be separate and independent from executive and legislative powers. That is not the case in Cameroon. *See* **Submission on Admissibility at 4-10.** Respondent is concerned, and rightly so, that this Commission should not replace its national courts in deciding the availability and effectiveness of remedies in this matter. But Respondent has not been able to rebut Complainants arguments that its vaunted national court system is neither independent nor impartial, being no more than an extension of the executive branch. To Complainants well-founded observations on the penchant of executive branch officials to countermand judgments rendered by high court judges, Respondent is trying to have it both ways. It condemns the actions of these procureurs, on the one hand, while it defends them on the other.[1]

[1]The "illegal act by the Procureur General of the South-West Province" is condemned even as Respondent is busy reminding us how this *illegality* "led to calm ... among the Bakweri community that the Complainants *claim* to represent and whose *Paramount* Chief S.M.L. Endeley has welcomed the change in the CTE's management, and at the Buea Rural Council, where Mayor Mbella Moki Charles has displayed a similar attitude." The Government of

Cameroon then goes on to point out how "this *providential illegal* act ... *satisfies* the Bakweri on the ground...." [Emphasis supplied]. **Respondent's Reply at 5.** We note in passing this irritating habit of Respondent's, reminiscent of British and French colonial practice, of designating spokesmen for the Bakweri people other than those they themselves have accredited: first, it was the Prime Minister and the Assistant Secretary General at the Presidency; this time, it is Mayor

Charles Moki Mbella and Chief Endeley. The fact of the matter is that Mr. Mbella is the municipal administrator of a town, 70% of whose population is non-Bakweri. To the extent that he is a spokesman for any group, it is for the citizens of Buea.

There are approximately sixty-three Bakweri villages and each is headed by a chief much like Buea whose chief is S.M.L. Endeley. In Bakweri tradition, each chiefdom is autonomous and no single chief speaks for and on behalf of *all* the Bakweri people. Ninety per cent of all the Bakweri chiefs are members of BLCC, complainants in this matter. It would appear that Respondent is not really interested in the views of Bakweri traditional rulers, since it already knows the position of BLCC, on the change of management in CTE. Respondent's interest is in the views of a handful of renegade chiefs, led by the paramount chief of BUEA *not* Bakweri, as Respondent erroneously asserts, who have gone out of their way to scuttle the efforts of BLCC.

1.1 Executive branch interference in the administration of justice

In an effort to temper the fanaticism of the South West Procureur General (SW PG), Respondent admits for the first and only time that his conduct in the CTE litigation was completely unlawful.[2] Even though this self-serving concession has yet to be translated into an appropriate sanction against the admittedly errant SW PG, [3]Respondent wants this Commission to believe that the SW PG's posture in the CTE litigation is fortuitous and isolated and should not therefore be the basis for condemning an entire system of justice. To support this rose-tinted portrait of Cameroonian justice that the zealousness of a State Counsel "*ne peut pas entacher tout un systeme judiciare ou, pour toujours et pour toute cause, la reputation des formations judiciaires du Fako*", Respondent relies on the celebrated case of ***Joseph Ncho v. Benjamin Itoe*, [BCA/1/81 Judgment 13 July 1981 Unreported] Respondent's Reply at 5-6.** If it is Respondent's contention that errant State Counsels are routinely called to order when they abuse their powers then the *Ncho v. Itoe* case is hardly the controlling legal authority.

In the first place, the twenty years that separate the Ncho/Itoe and CTE cases of prosecutorial abuse of

[2]Even this admission is problematic. *See* 1.2 *infra*.

[3]The PG is still on post but even more importantly he is still flouting high court judgments.

power support the contrary to Respondent's protestations that such misconduct is fortuitous or isolated and usually punished. This behavior is not only systemic and endemic, as Complainants contend, but routine and tolerated. Contrary to what Respondent would want this Commission to believe, the Ncho/Itoe and CTE examples expose a long-standing pattern of executive branch interference[4] in the administration of justice in Cameroon. In the ***Ncho v. Itoe*** case which

[4]To the question posed by Respondent: "[J]ust because the President of the Republic of France appoints and sanctions judges, can it be said that the French judicial system is at his service?"[**Respondent's Reply at 2]**, Complainants, answer is of course "No." But France is *not* Cameroon by any stretch of the imagination. The President of France presides over a judicial system in which the rule of law is firmly anchored; a system imbued with a tradition of judicial independence going back several centuries. More importantly, there is a clear and visible

Respondent relies on, Mr. Justice Nyamnsi, did not mince words when he expressed the Court's

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separation of powers in the French republican system of government that is scrupulously respected by the respective branches. Add to this the array of constitutional restraints on presidential power which makes it all but impossible for any French president to subject the judiciary to his will in the way that Cameroon's can. While the comparison with the French system makes for interesting reading, in truth only the *tropicalized* caricature of that republican tradition was reproduced in Cameroon, i.e., its form devoid of its rich content! As a consequence, what a President of France cannot do, the President of Cameroon can because the *Constitution* allows him to. Apparently, Respondent conveniently overlooked this minor detail.

> surprise to have it on record that the Appellant [Itoe] and the Ministry of Justice have been deliberately acting in violation of the provisions of the Presidential Decree No. 73/51 which amounts to administering justice in an unlawful manner. We would like to draw their attention to the fact that Decrees and Statutory provisions as well as procedural rules governing the administration of justice before the courts of the land are supposed to be strictly observed and enforced, and *we hope that they would not persist in the violation thereof*. ... [T]he truth is that the opinions as well as the orders of the courts of this Province [North West] have *consistently been disregarded* by the Legal Department. We ... hope that the Legal Department will retrace its steps and observe the provisions of Decree No. 73/51. **BCA/1/81 at 80** (Emphasis added).[5]

Far from affirming the independence of the Cameroon judiciary, the ***Ncho*** and ***CTE*** cases instead confirm Complainants' assertion that there is no such thing in practice as an independent judiciary in Cameroon. Complainants therefore submit that these cases are not atypical but reflect the true face of justice in Cameroon *not* the fictitious version spun by Respondent.

The ***Ncho v. Itoe*** case contradicts Respondent's wishful fantasies of an independent judiciary in yet another respect. Although Mr. Benjamin Mutanga Itoe, the Procureur General in that case, was found guilty for sundry tortious acts by two common law courts, the Mezam High Court[6] and a unanimous panel of the North West Court of Appeals[7], instead of being sanctioned for "administrating justice in an unlawful manner," Mr. Itoe was promptly moved to Yaounde and thereafter rewarded with a ministerial appointment. But not just any ministry! In a remarkable twist of irony, Procureur General Itoe found himself catapulted to the exalted position of Minister of Justice and Keeper of the Seals, the executive department directly responsible for all the high judicial officials of the republic. From this vantage position, the newly appointed Minister of Justice

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[5] *See also Helen Lum Acha & Another vs. Koungeb Justin,* Suit No. HCB/2/79 of 7th December, 1979.

[6] *Joseph Adu Ncho vs. Benjamin Mutanga Itoe,* Suit No. HCB/19/79 of 10th September, 1979. A default judgment of 3.120.000 francs CFA was entered against the defendant. On appeal, this amount was increased to 23.575.001 francs CFA.

[7] Civil Appeal No. BCA/1/81.

and Keeper of the Seals proceeded to sanction the Bamenda judges who heard his case and had found him guilty! Respondent cannot possibly be tendering the Ncho/Itoe saga in support of its claim that the zealousness of one single procureur should not be used to tarnish the reputation of an entire judiciary!!

The independence of the judiciary is the condition precedent of effective human rights protection. Cameroon's judiciary falls short on almost all of the 20 basic principles on the independence of the judiciary adopted by the United Nations General Assembly in 1985 and cannot therefore be relied on to protect the human rights of Complainants and other similarly situated citizens. The conduct of officials of the Legal Department condemned by Mr. Justice Nyamnsi violates two of these basic principles: Principle 2 which states that the courts "shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarters or for any reason;"and Principle 4 which provides that "there shall be no interference with the judicial process, nor shall judicial decisions be subjected to revision." *See* ***G.A. Res. 40/146, 40 U.N. GAOR Supp. (No. 53) at 254, U.N. Doc. A/40/1007 (1985).*** As the case law which Respondent relies on illustrates, executive branch interference in the administration of justice is routine and legendary.[8]

1.2 *De facto* exercise of judicial powers by executive branch officials

Having conceded that the suspension of the execution of a high court order by the Procureur General in

[8]Hardly a week goes by that the popular press fails to report on this "annoying interference." In an article entitled *Criminal Law: A conflict of systems,* Asong Ndifor, senior editor of **The Herald**, offers these examples: "During the trial of SCNC activists in Bamenda in 2001 the legal department wrote to magistrate Abenego Bea instructing him on how to handle the case. He repudiated the instruction and passed his judgement according to the evidence he had. He was later given a punitive transfer to the legal department in Buea. There is also the recent case where a Buea high court ruled that John Niba Ngu should be reinstated as general manager of the Cameroon Tea Estate but the South West legal department rejected the ruling and refused to order execution of the judgement." *See* **The Herald, Monday 16-17 June 2003, page 8. Attachment 3.** In the Monday, August 11, 2003 edition of **The Post** newspaper, the Minister of Justice and Keeper of the Seals is reported to have "ordered that all pending matters concerning Beneficial Life Insurance Company be withdrawn from court. This order is contained in a submission filed by the Southwest Attorney General.... The Attorney-General stated in his submission that 'we have instructions from the Hon. Minister of State in Charge of Justice and Keeper of the Seals, that all pending matters in court, whether criminal or civil, touching and concerning the parties in this case be withdrawn from court.'" *See Minister Orders Withdrawal of All Beneficial Life Cases,* **The Post No. 0495 of Monday, August 11, 2003, page 2. Attachment 4.**

the CTE litigation was a "completely illegal act", Respondent then strains logic and common sense with the argument that "this is not 'de facto power', but a factual situation." **Respondent's Reply at 4.** What distinguishes the one from the other? The word "*de facto*" is not a legal term of art, accordingly it should be given its ordinary English meaning, as it would be understood by the parties in this dispute. The relevant dictionary definition of "*de facto*" is "in fact, whether by right or not," "as a matter of conduct or practice not founded upon law" in contrast to *de jure*, "as a matter of law." Thus, in ordinary language, anyone who assumes an office or position under color of right and who exercises the duties of that assumed office is exercising power *de facto.* Ranking officials in the Ministry of Justice have routinely exercised *in fact* the authority of high court judges. Complainants have asserted that the actions of the SW PG as well those of other executive branch officials ["these drifts" to borrow Respondent's choice of words] though *not* sanctioned by law do occur *in fact*.

Respondent seeks to distinguish the action of the SW PG from that of the Nigerian Governor in the Firearms Robbery Act by arguing that the former was acting beyond the scope of his legal prerogatives while the latter was clearly operating within the legal framework of the Robbery and Firearms Act. **Respondent's Reply at 4.** In truth, their actions are indistinguishable. Both were exercising "discretionary and non-judicial power"; both did "not operate impartially", having set themselves above the regular, presumably, impartial courts; and both took decisions "not according to legal principles" but on the basis of expediency and self-interest.

1.3 A judiciary reputed for its lack of independence

Respondent is understandably prickly and defensive of its judiciary and is quick to dismiss the observations of the local press and even those of its international partners like the United States Department of State. Regrettably, the United States Government is not alone among Cameroon's foreign friends to voice grave reservations about the country's judicial system. Others have, including the World Bank,[9] the main underwriter of Respondent's privatization program which directly affects the disputed Bakweri lands; the Human Rights Committee,[10] watchdog over the

[9]***WORLD BANK REPORT NO. T-6928-CM TECHNICAL ANNEX TO THE MEMOMORANDUM AND RECOMMENDATION, MAY 22, 1996, para. 25, p. 6.*** (Bank commented on the slowness of the judicial process and observed that in 1996 3000 cases were pending at the Supreme Court.)

[10]Observations made by the Human Rights Committee on Cameroon's Report to that Committee in 1994 and 1999. After reviewing Cameroon's 1994 periodic on the state of human rights in the country, the Human Rights Committee ("HRC") questioned "*the independence of the judiciary; in particular, the composition of the Supreme Council of Justice does not seem such as to guarantee respect for this*

rights secured in the International Covenant on Civil and Political Rights and most recently Transparency International.[11] While Respondent can blithely dismiss these external witnesses, it will be hard put to sweep under the rug the scathing observations on its judiciary made by its own plenipotentiaries notably the Minister of Justice and Keeper of the Seals.[12] Nor can Respondent brush aside the criticisms leveled against this branch of government by none other than the President of the Republic in his 1999 New Year's Address to the Nation. After lamenting the scourge of corruption which has now spread to all sectors of Cameroonian society, the President next turned his attention to "judicial and legal officers whose task is precisely to ensure respect for the rules governing our society." As regards this branch of government, the President observed that "*[t]here are still many cases where justice is not rendered as it should. That is to say with dispatch and impartiality, in strict conformity with the laws and procedures in force. This should not be tolerated.* Even though I would want to believe so, the majority of our judicial and legal officers are upright, the deviant practices observed may lay the institution open to suspicion...."(Emphasis added). *See* **Attachment 2.**

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principle." Note that the members of this council are appointed by the President who presides over its deliberations! The HRC then recommended that "*measures should be taken, if necessary in the form of a constitutional reform, to guarantee the independence and impartiality of the judiciary, in accordance with article 14, paragraph 1, of the Covenant*." *See* **Concluding Observations of the Human Rights Committee, Cameroon: 18/04/94**, paras. 14 and 24. Five years later, when considering Cameroon's third periodic report, the HRC again observed that Respondent still had not addressed all the concerns it expressed in its previous concluding observations on the second report of 1994. *See* **Concluding Observations of the Human Rights Committee, Cameroon: 04/11/99**, para. 2.

[11]Three out of ten Cameroonians polled by Gallup International for Transparency International's **2003 Global Corruption Barometer**, singled out the judiciary as the institution from which they would like to eliminate corruption if they were given the opportunity. The July 2002 Gallup survey polled 30,487 people in 44 countries on the following question: "*If you had a magic wand and could eliminate corruption from one of the following institutions, what would your first choice be?"* The institutions enumerated including among others, the courts, the customs, educational system, medical services, police, etc. Thirty-one percent of the Cameroonian respondents picked out the courts as their first choice with the police coming in a distant second being singled out by only 13.7 per cent of the respondents. In only two other countries did the majority of the respondents single out the court system: Indonesia (32.8%) and Peru (35%). Available at www.transparency.org/press release_archive/2003/2003.07.03.global corr_barometer.

[12]While admitting that the Cameroon judiciary is corrupt, Justice Minister Amadou Ali tries to place the blame elsewhere: "*la corruption existe parce qu'elle est entretenue par des corrupteurs, dont beaucoup se recrutent, malheureusement, dans le monde de l'entreprise (...) Parce qu'ils veulent a tout prix gagner leurs proces, des chefs d'entreprises approchent des magistrats et leur font des offres allechantes, les amenant ainsi a rendre des decisions qui, si elles arrangent leurs commanditaires, donnent de la justice camerounaise, l'image d'une justice inapte a soutenir le developpement de l'entreprise et insecurisante pour les invesrissements."* *See* **Le Messager, no. 1519/vendredi 06 juin 2003, page 5***; see also* **Attachments 1, 1a, 1b** hereto**.**

The point Complainants wish to stress here is that even the President of the Republic of Cameroon found it necessary to publicly voice, to the nation and the world at large, his grave concerns about the rampant corruption and lack of impartiality that have contaminated the country's judiciary.

Against this background of overwhelming evidence of a flawed and seriously compromised national court system, fortified by the deposition of Cameroon's own Head of State, this Commission will agree that Complainants' loss of confidence in Cameroon's judiciary is well-founded to justify a waiver of the exhaustion of local remedies requirement. Waiving this requirement in the instant case will have the salutary effect of forcing countries like Cameroon which do not have a responsible judicial system to bring their judiciaries up to international standards. It will send a powerful message to African States that they cannot hide behind procedural technicalities, like Respondent is trying so desperately to do here, in order to prevent this Commission from examining cases for which the African Commission was specifically created. Having willingly agreed, in the full exercise of its sovereignty, to open direct access to international jurisdiction to individuals like Complainants, Respondent should not now try to cut off that right by insisting on the technicality of prior exhaustion of domestic remedies especially when these remedies have been shown to be inadequate and ineffective.

2. Revisiting the Exhaustion of Domestic Remedies Rule

2.1 Respondent's one-dimensional approach to the doctrine of exhaustion

While Complainants have no doctrinal quarrel with Respondent's representation of the conceptual basis of the local remedies rule, they maintain nonetheless that the linear focus on going through the domestic courts ignores other equally important aspects of this rule.[13] In Complainants' view because the right to individual petition, captured in Article 58 (7) of the African Charter, holds such a prominent place in international human rights law, any restrictive interpretation would not correspond to its aim and purpose. Therefore, insisting that individuals seeking to assert their rights as global citizens, by appealing *directly* to this Commission, *must* first go through the national court system even when it has been demonstrated that that system lacks independence, amounts to a preference for a formalistic approach that is totally at odds with the protection of the human rights enshrined in the African Charter. Putting form over substance also leaves victims of human rights

[13]The rule also talks of providing respondent government with notice of a human rights violation in order that it can remedy the violation prior to being haled before the Commission. The fear of contradictory judgments of law at the national and international levels is obviated in this case because Complainants, after waiting nine years for presidential action to no avail, are now before an international tribunal whose decision the Cameroon Constitution guarantees will be respected. Since the Constitution recognizes the supremacy of international law over domestic laws, there is no reason to fear that the Commission's decision will not be given *res judicata* effect by the national courts.

abuses in Africa defenseless against an all-powerful State! Complainants submit that any procedural system is nothing but a means of attaining justice; and justice cannot be sacrificed for the sake of mere technicalities. ***See Dismissed Congressional Employees/Peru, Report No. 52/00, Cases 11.830 and 12.038, Inter-Amer. Comm. Hum. Rights, June 15, 2001.***

A one-dimensional approach to the exhaustion rule creates an imbalance between individual complainants and respondent states in favor of the latter. It makes it possible for the respondent state to avoid addressing the merits of a complaint alleging human rights violations through a well-timed objection to the non-exhaustion of *domestic legal remedies*. Thus, outside the well-known exceptions to this rule, such an objection is enough to deny an individual complainant who alleges State violations of Charter guaranteed rights from having his complaint heard on the merits. Complainants understand the right to individual petition to include the principle of procedural equality of the parties. This procedural equality of arms (*egalite des armes*) is essential to any jurisdictional system of protection of human rights. Complainants respectfully urge this Commission to redress this imbalance in order to preserve the principle of procedural equality. Because the case law of this Commission is in a constant process of progressive development, the Commission can now seize this opportunity to engage in a jurisprudential construction of Article 56(5) that would have the effect of putting the parties on an equal footing and not create the appearance of protecting only respondent states to the clear detriment of individual complainants. This is their humble submission.

2.1.1 A narrow interpretation does violence to the plain language of Article 56(5)

Respondent has based its entire case for the exhaustion of local remedies on the need to avoid transforming this Commission into a tribunal of first instance. Accordingly, Respondent seeks to limit the domestic remedy to which Article 56 (5) of the African Charter refers to only "*remedy sought from courts of a judicial nature.*" We submit that this rigid interpretation of the exhaustion of local remedies rule does violence to the plain language of Article 56(5). Under international law, the appropriate starting place in treaty interpretation is the text of the treaty. This textual approach to treaty interpretation is mandated by the rules of interpretation prescribed by the **1969 Vienna Convention on the Law of Treaties.** Article 31 of the Vienna Convention provides that: "[a] *treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."* What then is the plain and ordinary meaning to be given to the language of Article 56(5) of the African Charter?

Article 56(5) states:

"Communications relating to Human and Peoples' rights referred to in Article 55 received by the Commission, shall be considered if they: .... 5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged."

The language of Article 56(5) is sufficiently clear and admits of no ambiguities that would warrant

dispensing with the plain language rule. The article makes no mention of limitations to the local remedies that must be exhausted. While it is commonly understood that local remedies would include recourse to the courts, however, on the face of it Article 56(5) does not limit domestic remedies to only those that can be obtained in the court system. Nor does it expressly exclude from local remedies those provided by legislative or executive authorities. Accordingly, the plain and ordinary meaning of this provision should be given effect as it expresses the intention of the framers of the African Charter.

Following the textual approach to treaty interpretation favored by the Vienna Convention, when a tribunal is called upon to interpret a treaty, such as the African Charter, it must proceed on the assumption that the intention of the framers of this instrument is expressed in the words of the document which it has to interpret. In the instant case, it must be presumed that the intention of the framers with respect to the exhaustion of local remedies rule is clearly expressed in Article 56(5). *See* ***Comments of Sir Eric Beckett on the Report of M. H. Lauterpacht (of the Second Commission of the Institute of International Law) on the Interpretation of Treaties,*** 43-1 Ann. Inst. D. Int'l 437-38 (1950). Therefore, Respondent's attempt to restrict the meaning of "local remedies" to only those "*sought from courts of a judicial nature*" must be rejected because such is not the expressed intention of those who drafted Article 56(5) of the Charter.

Furthermore, the Vienna Convention rules of interpretation prefer an interpretation that conforms to the object and purpose of the instrument. Respondent's narrow reading of Article 56(5) clearly jeopardizes the objectives of the Charter. Complainants submit that provisions of human rights law should be liberally construed to accomplish the purposes of the international bill of rights in general and the African Charter in particular. Since the phrase "*after exhausting local remedies"* has little inherent meaning and can be construed narrowly or broadly, only a broad construction will ensure the effective protection of the guaranteed human rights under the African Charter.

2.1.2 A restrictive interpretation not in accord with international law

Respondent's narrow reading of Article 56(5) does not accord with generally accepted rules of international law which recognize not only judicial remedies but also any *administrative* domestic remedy that may provide redress in the circumstances of the case. *See* ***Interhandel (Switz. v. U.S.), Preliminary Objections, 1959 ICJ REP. 6, 27 (Mar. 21).*** As was stated in the ***Ambatielos Case (Greece v. United Kingdom), 1951, 12 R. Int'l Arb. Awards 91, 120, 122,*** the phrase "local remedies" should be interpreted broadly, including "the whole system of legal protection, as provided by municipal law," not only the courts and tribunals but also "the use of procedural facilities which municipal law makes available to litigants."

At issue in the instant case is whether Complainants, by appealing directly to the President of the Republic, exhausted the means of recourse placed at their disposal by Cameroon law? *See* ***Claim of Finnish Shipowners (Finland v. United Kingdom), 1934, 3 R. Int'l Arb. Awards 1484, 1498-1505.*** We answer in the affirmative. Complainants took advantage of one of the principal founts of legal

protection available to them under Cameroon's inchoate judicial system. For purposes of this rule and in the context of Cameroon's presidential system, a presidential intervention is considered one of the most effective remedies available to Complainants.[14] Under article 5(2) of the Cameroon Constitution, it is the President who is charged to ensure compliance with international treaties and conventions. One such international instrument is the African Charter which Complainants state has been breached by Respondent. Therefore, by petitioning the President, as Complainants did over a 9-year period, Complainants were exhausting the only domestic remedy available to them in the circumstances of this case.

2.1.3 Broad construction favored by other tribunals and scholarly writings

The less restrictive interpretation of the exhaustion rule is favored by the European Court of Human Rights, *see* ***Klaas v. Germany, 18 Eur. H.R. Rep. 305 (1994)*** (where the Court stated that the "national authority" referred to in Article 13 of the European Convention may not necessarily be a judicial authority), as well as the Inter-American Court of Human Rights, particularly in its judgments in the so-called *Honduran cases.*[15] Leading publicists have also embraced a broad interpretation of the local remedies rule. The Brazilian jurist and President of the Inter-American Court, Antonio A. C. Trindade, who has written extensively on the exhaustion doctrine, takes the view that a rule created and applied in matters of diplomatic protection should not apply *mutatis mutandis* to human rights cases:

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[14]In a story carried by **The Post** newspaper, the Minister of Justice and Keeper of the Seals is reported to have "ordered that all pending matters concerning Beneficial Life Insurance Company be withdrawn from court," disclosing "that ***there is a committee at the Presidency of the Republic of Cameroon that has been charged with treating all matters concerning Beneficial Life Insurance Company***." *See Minister Orders Withdrawal of All Beneficial Life Cases,* The Post No. 0495 of Monday, August 11, 2003, page 2 (Emphasis added). **Attachment 4.**

[15]Beginning with its eleventh Advisory Opinion of 1990 and Judgments in the *Velasquez-Rodriguez*, the *Godinez Cruz* case, and the *Fairen Garbi and Solis Corrales* case, the Inter-American Court began expanding the interpretation of the local remedies rule as a condition of admissibility of international petitions or communications under the American Convention. It did so by going beyond the generally recognized exceptions of undue delays and denial of justice and by tackling the issues of distribution or shifting (between complainants and respondent states) of the burden of proof with regard to the exhaustion and the express or tacit waiver of the local remedies rule. *See* ***Antonio Augusto Cancado Trindade, "Thoughts on Recent Developments in the Case-Law of the Inter-American Court of Human Rights: Selected Aspects,"*** *Proceedings of the 92nd Annual Meeting of the American Society of International Law, 192, 193 (April 1-4, 1998).*

> [T]o claim that the local remedies rule should be applied in human rights protection exactly as diplomatic protection, to claim that the content or scope of the rule is not affected by contextual values or *ordre public* in respect of the protection of the rights of the human person and not of the state, is to close one's eyes to reality. Generally recognized rules of international law, besides undergoing an evolution of their own within the contexts in which they are applied, necessarily undergo, when enshrined in human rights treaties, some adjustment, dictated by the special character of the object and purpose of those treaties and by the generally recognized specificity of the international protection of human rights.
>
> This is the lesson drawn from the experience accumulated in this domain; progress in the international protection of human rights has been made possible in the last decades, as well as in relation to the operation of the local remedies rule, by an awareness of the specificity of this *droit de protection* (which calls for an interpretation of its own), by a proper understanding of the basic premises underlying the mechanisms of protection and by faithful pursuit of their object and purpose. *See* ***A.A. Cancado Trindade, Book Review: C.F. Amerasinghe, Local Remedies in International Law (1990),*** *86 American Journal of International Law 626, 636 (1992).*

A faithful pursuit of the object and purpose of the African Charter calls for an interpretation of the exhaustion of domestic remedies rule in such a way that would not allow the State to prevent its citizens from enjoying their fundamental human rights.

It is in this light that one publicist has criticized the rule in *Cudjoe v. Ghana,* which Respondent cites with approval, for being "too dogmatic," *See* ***Nsongurua J. Udombana, "So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights,"*** *97 American Journal of International Law, 1, 27 (2003)***,** since, as a renowned publicist notes, "remedies may be available whatever the constitutional status of the agency taking the measure concerned. The test remains that of the reasonable possibility of an effective remedy."*See* ***Ian Brownlie, Principles of Public International Law 500 (5th ed. 1998).*** A student of this Commission's jurisprudence has observed that despite its wish not to be transformed into a tribunal of first instance, the Commission has increasingly found itself replacing national mechanisms for judicial remedies. This role has been imposed on the Commission by the "*lack of independent national judiciaries, and massive human rights violations that overwhelm domestic remedies*." ***Udombana at 16.*** The Commission has thus become the last hope for the defenseless victims of human rights violations in Africa.

2.2 Weighing and balancing relative harms to both parties if rule is waived

Complainants submit that the application of the local remedies rule requires a balancing of the relative merits and the relative burdens this rule places on the litigating parties. Since the Commission's own jurisprudence lays much emphasis on a contextual analysis, Complainants submit that the

application of this rule in this particular case must take cognizance of the nature of Cameroon's presidential system where the President exercises both executive and *de facto* judicial powers. Indeed his latter powers are far more extensive than those enjoyed by even the higher judicial bench. We submit that it is within the context of this Cameroonian specificity or peculiarity that the Commission should interpret and apply the local remedies rule in determining the admissibility of the BLCC communication.

2.2.1 Effect on complainants if exhaustion rule is not waived

In weighing and balancing the relative harms to the parties if the rule of exhaustion is not waived**,** Complainants stand to lose more than Respondent. The Cameroon Government's insistence on the exhaustion of domestic remedies is pled in bad faith and it risks wrecking irreparable damage to Complainants' Charter protected rights. The harm to Complainants is two-fold. First, in requiring them to go through the motion for the sake of satisfying this technicality, Respondent is well aware of the long delays in the disposing of cases in its courts and does not honestly expect that this situation will change anytime soon.[16] A most instructive example is ***Communication No. 272/2003*** filed by **Interights** of London in July 2003 on behalf of a group of Cameroonians whose property was destroyed in Bamenda in 1992. The original case had been languishing in the Supreme Court for almost five years until it was mercifully rescued by this Commission. When Respondent keeps insisting on going through this court system, it is simply to force Complainants to spend time and scarce financial resources marking time at the same judicial spot.

Furthermore, Respondent's insistence that Complainants exhaust local remedies, assuming that they are available in the first place, is a poorly disguised attempt to buy time for Respondent to look around for suitable buyers for the remaining CDC plantations. A similar tactic was used in connection with the sale of the Tole Tea estate where Respondent sought and was granted leave by the U.N. Sub-Commission to resolve this matter amicably only to turn around and dispose of the Tole property. Respondent is obviously banking on the likelihood that by the time a domestic court gets to hear the BLCC case, the remaining CDC plantations would have been privatized thus rendering this matter moot. *See* ***Government of Cameroon, Cameroon Poverty Reduction Strategy Paper of April 2003, IMF Country Report No. 03/249, Annex 1 at 137-138*** *(where Respondent commits to execute in a*

[16] A 1996 World Bank Report called attention to problems with the administration of justice in Cameroon which it described as "manifold. ... Judgements are often rendered in contradiction to the law; parties adopt dilatory measures; delays in dealing with cases are long (e.g., there are 3,000 cases pending at the Supreme Court); the Office of the Clerk of the Court operates in a very rudimentary fashion and is the source of substantial delays; the bailiff system operates haphazardly and there is much interference with the work of bailiffs; registering a mortgage is a difficult proposition." *See* **WORLD BANK, TECHNICAL ANNEX TO THE MEMORANDUM OF RECOMMENDATION (REPORT NO. P-6928-CM) ON A PROPOSED CREDIT IN THE AMOUNT EQUIVALENT TO SDR 8.8 MILLION TO THE REPUBLIC OF CAMEROON FOR A PRIVATE SECTOR TECHNICAL ASSISTANCE PROJECT, MAY 22, 1996**, at page 6, para. 25.

satisfactory manner the 3rd Structural Adjustment Credit by the formulation and completion of "the privatization of banana, hevea and palm oil production (CDC)" by 2005.). This Honorable Commission should not allow itself become an unsuspecting accomplice to this carefully crafted stratagem to deny Complainants their day before an *impartial* tribunal not otherwise available to them at home.

2.2.2 Effect of a waiver on respondent

Where a mechanistic application of the exhaustion of local remedies rule risks damaging Complainants irreparably, Respondent, on the other hand, loses nothing if this requirement is waived. As a matter of fact, Respondent stands to gain from a process that promises a relatively quick resolution since that would put this matter to rest finally. This apparently being what the Government of Cameroon genuinely wants, having earlier indicated to the U.N. Sub-Commission of its eagerness to resolve this matter once and for all. Respondent should welcome with enthusiasm any opportunity to make good this pledge. Allowing this Commission to entertain the merits of this case provides Respondent with just such opportunity.

Secondly, given Respondent's notoriously slow and overburdened court system where cases are tied up for years before being called up, Respondent should be as eager as Complainants to submit this matter to a tribunal that is able to expedite its resolution.

Finally, the decision by this Commission to invoke provisional measures under rule 111(3) of its Rules of Procedures pending a final decision on this matter effectively halts Government's privatization of the CDC which is an integral part of Government's overall economic reform program. However, this obstacle could be quickly removed if the Commission is allowed to hear the merits of this case. It is therefore in Respondent's interest if this matter is settled expeditiously so that it can move forward with its privatization agenda without any worries that the Bakweri, who are not opposed to privatizing CDC *per se*, will continue to be an obstacle.

2.3 The 'flood gates' hypothesis exaggerated

Implicit in Respondent's case for the exhaustion of local remedies is the fear that a relaxation of this requirement will transform this Commission into a court of first instance. While Complainants share in this apprehension, they maintain, nonetheless, that the specter of the African Commission being 'flooded' with untold number of 'frivolous' complaints overstates the case and ignores African realities. Complainants submit that the effect, if not the intent, of Respondent's position is to make access to this Commission all but impossible for African victims of human rights abuses whose "domestic courts are not able to serve as defenders of human rights" and who "cannot afford to 'oil the palm' of the judge" in order to get their case "heard on time or at all."*See* ***Nsongurua J. Udombana, "So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights,"*** *97 American Journal of International Law 1, 16*

(2003). Complainants respectfully submit that declaring *this* communication admissible will not add to the Commission's workload nor will it have the apocalyptic effect on its procedural architecture that Respondent appears to dread.

2.4 Respondent has had adequate notice and sufficient time to cure complained violation

It is true as Respondent asserts that one of the purpose of the exhaustion of domestic remedies requirement is to give national courts an opportunity to decide upon cases before they are brought to an international forum. This way contradictory judgments of law at the national and international levels can be easily avoided. But ***Communication No. 156/96: Social & Econ. Rights Action Center for Econ. & Soc. Rights vs. Nigeria***, which Respondent cites with approval, also relates the exhaustion rule to the need to provide the State with adequate notice of a human rights violation in order that it can remedy the violation prior to being haled before this Commission. This notice can be presumed when the alleged violation is open and notorious. Clearly when a Government has knowledge, actual or constructive, of a complained violation and fails to remedy it, it cannot retreat to the position that because the alleged victims did not submit themselves before the law courts, access to an international tribunal should be denied them.

Respondent has admitted that Complainants have sent a series of petitions to the President since 1994 none of which has been formally acknowledged in *writing* by the President. By deposing before the U.N. Sub-Commission that it was in negotiations with Complainants with a view to arriving at an amicable settlement of the dispute once and for all, Respondent was again admitting its knowledge of the complained human right violation.[17] Nine years is more than sufficient time for the Government of Cameroon to have cured this problem. Having failed to do so, Complainants should not be required to work their way through a notoriously slow judicial system just to give Respondent the satisfaction of having complied with it believes is the local remedies requirement.

3. Non-availability of Domestic Remedy to Exhaust

[17] Soon after this declaration was made, Respondent proceeded to alienate Tole Tea Estate without consulting the landowners, Complainants in this matter. This would suggest an ulterior motive behind Respondent's insistence that local remedies be exhausted. It stands to reason that Respondent is pleading this position not out of any respect for upholding or preserving "*the integrity of the Charter's procedural system,*" since Respondent is notorious in its non-respect for the rules of procedure of other international human rights organs: witness, for instance, the *volte-face* on the solemn undertaking it gave to the U.N. Sub-Commission in February 2002! Rather, Respondent is latching on to the exhaustion of local remedies as a dilatory tactic to tie Complainants down in the court system while Respondent sells off the remaining CDC sectors.

Respondent admits in its Reply Memorial that this matter is "fundamentally a legal question"[**Respondent's Reply at 6]** which hinges on the interpretation of the 1974 Land Law and the Privatization Decree of 1994. Assuming *arguendo* that the BLCC communication is one to which the local remedies rule applied, Respondent still would bear the burden of proving that effective remedies are available in local courts in Cameroon. This requires that local courts are open to the Complainants and offer effective redress. Consequently, when the local legal system cannot redress the wrong, the rule does not apply and there is no obligation to turn to local courts.

Complainants seek to establish that there is no competent local judicial institution before which this fundamentally legal question can be interpreted. Complainants submit that neither the ordinary law courts nor the Administrative Bench of the Supreme Court is competent to entertain this dispute and, therefore, for all intents and purpose, there are no domestic remedies available for Complainants to exhaust.

3.1 A preeminently constitutional question

To the extent that Respondent has invoked ***Decree No. 94-125 of July 14, 1994,*** as authority to transfer private lands to third parties, this raises two fundamental constitutional issues. The first issue raised is the security of the right to private property as provided for in the constitution of Cameroon: whether this right can be abridged by a presidential decree such as the decree of July 14, 1994?[18] ***See Law No. 65 of 96-06 of 18 January 1996 to amend the Constitution of 2 June 1972, Preamble, paragraph 5 and Article 65*** [hereinafter cited as the "Cameroon Constitution"]. The second question raised is the following: when two pieces of executive legislation are in conflict on an issue of fundamental constitutional importance, which one should yield to the other and which court decides? Complainants submit that the only court with jurisdiction ***ratione materiae*** is the Constitutional Council and for reasons which shall be addressed below this remedy is not available to Complainants to exhaust.

3.1.1 The right to property is a constitutionally protected right

The right of private property is protected in the Constitution of Cameroon in two ways: in express terms

[18] In Cameroon's constitutional scheme, the executive branch exercises legislative competence and a Presidential decree has the force of law because it is issued by the Head of State in the exercise of an ***affirmative grant of legislative powers*** by the Constitution. ***Art. 27*** provides that "***matters not reserved to the legislative power shall come under the jurisdiction of the authority empowered to issue rules and regulations,"*** i.e., the President of the Republic. ***Art. 8(8)*** stipulates that the President of the Republic ***"shall exercise statutory authority"*** while ***Art. 28*** provides that ***"parliament may empower the president of the republic to legislate by way of ordinances for a limited period and for given purposes."***

in the '***declaration of rights'***[19] and by reference to the provisions of other international human rights treaties. One of such treaties expressly mentioned in the Preamble of the Constitution is the African Charter on Human and Peoples' Rights.

3.1.1.1 The doctrine of incorporation by reference

By virtue of the ***doctrine of incorporation by reference*** the African Charter together with the other human rights instruments to which Cameroon is a party have been absorbed into Cameroonian law, creating in the process judicially enforceable rights and duties for all persons within the territory of Cameroon.

3.1.1.2 The doctrine of the supremacy of the constitution over ordinary laws

Article 65 of the Cameroon Constitution confers on these human rights treaties the same status and the same binding force as other constitutional provisions. Under Article 45 all "[d]uly approved or ratified treaties and international agreements shall, following their publication, *override national laws*, provided the other party implements the said agreement." (Emphasis added). The combined effect of articles 65 and 45 of the Cameroon Constitution is to entrench the principle that the rules of international law in general and the provisions of particular international agreements, such as those expressly mentioned in the Preamble, are subject only to other prohibitions, restrictions, and requirements of the Constitution. This is consistent with the ***doctrine of the supremacy of the constitution over ordinary laws*** which finds express mention in the majority of the world's constitution. ***See e.g.***, Art. 25 of the **German** Constitution ("the general rules of public international law are an integral part of federal laws and shall directly create rights and duties for the inhabitants of the federal territory."); Art. VI of the Constitution of the **United States of America** ("the Constitution and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the land...."). ***see also*** Art. 55 of the **French** Constitution of 1958; Art. 28(1) of the **Greek** Constitution of 1975; Art. 133 of the Constitution of **Mexico** of January 31, 1917; Art. 31 of

[19] "*Ownership shall mean the right guaranteed every person by law to use, enjoy and dispose of property. No person shall be deprived thereof, save for public purposes and subject to the payment of compensation under conditions determined by law.*"

the Constitution of **Argentina** of May 1, 1853; Art. 66 of the Constitution of the **Netherlands** of 1953 amending the Constitution of 1815.

Whereas, the doctrine of the supremacy of the constitution ranks treaty provisions equally with constitutional provisions, however, all other domestic laws and administrative regulations, including the CDC privatization decree, are subordinate to the former. Therefore, the provisions of this decree must be measured against the obligations the Government of Cameroon assumed under the African Charter as well as the other relevant international human rights instruments that now form an integral part of the ***Supreme Law of Cameroon.***

3.2 The appropriate domestic court to resolve a constitutional question

Complainants submit that the substance of ***Decree No. 94-125 of July 14 1994*** is in direct conflict with the ***1974 Land Tenure Law***. The latter which establishes clear rules governing land tenure provides in its **Part II, Section 2(e)** that ***"lands entered in the Grundbuch... shall be subject to the right of private property.***" That law also provides that "national lands", on the other hand, shall be administered by the State. Complainants assert that the lands that are at the root of this complaint are subject to the right of private property within the meaning of Section 2(e) of the Land Law.

As they have argued in their various pleadings, ***Decree No. 94-125*** is not just about the sale of CDC plantations. The divestiture of these assets cannot be separated from the underlying land question. The point is that the crops that constitute the assets of the CDC (tea, banana, palms, and rubber plantations) do not grow in the air but on land– therefore, CDC's most prized asset, Complainants maintain, is the land on which these crops are grown. *A fortiori* Respondent's CDC privatization program is inextricably linked to the Bakweri land problem and the likelihood that these private lands will be alienated by Respondent[20] contrary to the provisions of the ***Land Tenure Act*** raises a constitutional issue, i.e., the constitutional status of the right to property.

[20]On this issue of alienation of private lands, Complainants note that Respondent has already given Cameroon Tea Estate (CTE) a lease of 70 years, with all ground rents payable to Respondent. Furthermore, in the apportionment of shares in CTE, the Bakweri landowners have been given nothing, although provision was made for the largely immigrant labor force to have 5%.

3.3 Non-availability of competent domestic court to resolve this instant question

Respondent has taken the position that all CDC-occupied lands are "National Lands" and therefore State property, to be administered by the State. *See* **Submission on Admissibility at 17.** As a consequence, the State can negotiate the privatization of the CDC, including the transfer of the occupied lands to third parties, without need to consult Complainants. Respondent's position does violence to the provisions on private land ownership contained in the 1974 Land Law. More fundamentally, the Cameroon Government's position inexorably sets up a clash between two of its own laws: the CDC privatization decree and the 1974 Land Law. This clash raises a constitutional question that cannot be resolved by the Administrative Chamber of the Supreme Court[21] nor any of the inferior courts.[22]Only the Constitutional Council is competent to handle this problem by invalidating either ***Decree No. 94-125*** or the ***1974 Land Tenure Act*** on grounds of unconstitutionality. Article 46 of the Constitution provides, in pertinent part, that the Constitutional Council ***"shall rule on the constitutionality of laws."*** It is for this Council to rule on whether the 1974 Land Law has been repealed by Decree No. 94-125 and, if that is the case, the constitutional basis in support of the repeal. It is only the Constitutional Council that can determine what limitations can be placed on the sacred and inviolable right to property; and it is only this tribunal in Cameroon's jurisdictional architecture that is competent to assess the public necessity requirement to which all State takings must satisfy.

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[21]Cameroon law exempts from the jurisdiction of administrative tribunals administrative decisions that touch on fundamental rights in general and the right to property in particular. These matters are usually reserved for the common law courts. Article 9, paragraph 4 of ***Ordinance No. 72/6 of 26 August 1972*** is quite explicit in its exclusion from the jurisdiction of the Administrative Bench all disputes concerning the expropriation or acquisition of land. ***See Ordinance No. 72/6 of 26 August 1972 establishing the Organization of the Supreme Court as amended by Law No. 76/28 of 14 December 1976.*** *See also* the Supreme Court case, ***John Enoh vs. Zachary Abe Tatah, No. 26/78/79/CC cited in Joseph Ncho v. Benjamin Itoe, BCA/1/81 Judgement 13 July 1981 (Unreported), at p. 75.***

[22]In principle, the jurisdiction of administrative tribunals in civil law systems is limited to "*les litiges nes de l'activite de l'administration*", but not all disputes spawned by administrative action are subject to the jurisdiction of these courts. Thus, recourse by Complainants to the Administrative Bench is foreclosed on grounds of lack of subject matter jurisdiction. But recourse to the ordinary law courts is also unavailable as these courts are not competent to review the constitutionality of presidential decisions taken in the exercise of his law-making authority. Under civil law practice (Cameroon has a bi-jural legal system of both civil and common law), disputes arising from legislative acts are exempt from examination by both the administrative tribunal and the ordinary law courts and can only be properly brought before the *Conseil constitutionnel*, the only tribunal competent to pronounce on the constitutionality of actions taken in the exercise of a legislative grant of power. ***See*** **JEAN RIVERO & JEAN WALINE, DROIT ADMINIS-TRATIF *155, paras. 1 and 2; 157, para. 1* (18th ed. Dalloz 2000).** In Cameroon also only the Constitutional Council has jurisdiction over constitutional questions.

3.3.1 The *locus standi* problem

The remedy of recourse to the Constitutional Council presents Complainants with two problems.

First, the Constitutional Council is yet to be established despite numerous promises by Respondent to international institutions– including a recent pledge to the International Monetary Fund contained in its ***Poverty Reduction Strategy Paper of April 2003, IMF Country Report No. 03/249, at para. 391 (where Respondent makes bold the claim that "the law establishing the Constitutional Council is expected to be adopted and promulgated in 2003.")***.[23] The Constitution provides that in the interim the Supreme Court can sit as the Constitutional Council until a permanent body is established. But the few occasions the Constitutional Council has sat, usually to hear election disputes and declare results, it has had to be convoked by a presidential decree. Complainants harbor serious doubts that such a decree can be forthcoming given Respondent's posture in this case.

Second, assuming that a Presidential decree could be issued convoking the Constitutional Council to hear this dispute, it is only Respondent *not* Complainants who has standing before this tribunal to raise this constitutional issue. Art. 47 (2) of the Constitution provides that ***"matters may be referred to the Constitutional Council by the President of the Republic, the President of the National Assembly, the President of the Senate, one-third of the members of the National Assembly or one-third of the Senators.***

Presidents of Regional Executives may refer matters to the Constitutional Council whenever the interests of their regions are at stake."

The Constitutional Council, which alone has jurisdiction to remedy this situation, is not available for Complainants to exhaust. Accordingly, Complainants submit that "[t]here can be no need to resort to the municipal courts if those courts have no jurisdiction to afford relief...."***Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania), P.C.I.J., ser. A/B, No. 76 at 18 (1939)***. Complainants urge the Commission to follow the wise counsel of A. Bagge, Sole Arbitrator in the ***Claim of Finnish Shipowners at 1484,*** that "*it is no objection to an international claim that there exists some theoretical or technical possibility of resort to municipal jurisdictions. The local remedy must be*

[23] A year earlier Respondent promised to "adopt an action plan, with a view to establishing a Constitutional Council (*Conseil Constitutionnel*) by ***end-September 2002*** (structural benchmark)." *See August. 28, 2002 Letter of Intent, Technical Memorandum of Understanding to the IMF*, at para. 20 [Emphasis added].

really available and it must be effective and adequate." That is not our case.

4. Tacit Waiver of the Exhaustion of Domestic Remedies Requirement

In the alternative, Complainants respectfully asks this Commission to read from Respondent's conduct, in the nine years since this matter first came up, a *tacit* waiver by Respondent of the local remedies requirement. Consequently, Respondent should be estopped from challenging the admissibility of the BLCC communication on grounds of non-exhaustion of domestic remedies.

> *Under generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it before it has had the opportunity to remedy them by internal means. The requirement is thus considered a means of defense and, as such, waivable, even tacitly. A waiver, once effected, is irrevocable. ... As a corollary to this doctrine, failure to exhaust domestic remedies as an impediment to the competence of the Commission to examine a case must be alleged at the earliest possible opportunity*. ***See Cesar Chaparro Nivia and Vladimir Hincapie Galeano v. Colombia,* Case 11.026, Report Nº 30/99, Inter-Am. C.H.R, OEA/Ser.L/V/II.95 Doc. 7 rev. at 83 (1998).**

Although this Commission's jurisprudence reveals no case where a responding State has *tacitly* waived the exhaustion of domestic remedies requirement**,** however, with Article 60 of the Charter in mind, Complainants plead the case of ***Cesar Chapparo Nivia et al.*** as persuasive authority. In that case, more than four years lapsed between the date the case was opened, i.e., the original petition was submitted to the Inter-American Commission, and when the State of Colombia first argued that petitioners had not complied with the exhaustion of domestic remedies requirement. During this period, Colombia presented observations on six occasions without once referring to the exhaustion requirement as an impediment to the admissibility of the case. Under these circumstances, the Commission found that Colombia's failure to allege that domestic remedies had not been exhausted in a timely manner was equivalent to a tacit waiver of the right to present this objection. Accordingly, her arguments regarding noncompliance with this admissibility requirement were rejected *in limine litis* for having been untimely filed.

4.1 Respondent's pattern of conduct implies a waiver of the exhaustion requirement

Respondent must be presumed to have tacitly waived the exhaustion requirement based on its conduct over the past nine years.

- On August 18, 1994 a Government delegation led by the Assistant Secretary General at the Presidency and including the Minister of Higher Education as well as the Director of Cabinet at the Prime Ministry met with Complainants. In the course of this meeting, the leader of the delegation

volunteered this statement: "*We have come here not to tell everything ... nor to receive from you anything ... because* ***this matter cannot be resolved in a single meeting like this one."*** (Emphasis added)

- In February 1999 yet another Government Delegation led again by the ubiquitous Assistant Secretary General at the Presidency, accompanied this time by two Government Ministers (respectively, in charge of Budget and Stabilization and Special Duties at the Presidency) met again with Complainants. The delegation delivered the same stock message but with a twist as Complainants were now advised to forward their complaints directly to the President. This they did in a March 3, 1999 memorandum.

- In October 2000, two months after submitting a Rule "1503" petition to the United Nations Sub-Commission on the Protection of Minorities, Complainants were invited to meet with the Prime Minister and the Assistant Secretary General at the Presidency.

- Sometime in February 2002, Respondent pledged before the U.N. Sub-Commission of its willingness to resolve Bakweri land problem *"once and for all."* This message was conveyed to Complainants five months later, about the same time negotiations for the sale of the CDC Tole tea estates were already underway**.**

- On February 6, 2003, after having been served by this Commission of the BLCC Communication, Respondent sent yet another fact-finding delegation headed by Mr. Ayissi Edmund from the Ministry of Territorial Administration and Decentralization (MINAT/D) to meet with Complainants. The purpose of the Ayissi mission was to ascertain progress made so far between the Government of Cameroon and BLCC over the disputed lands, in light of Government's pledge before the U.N. Sub-Commission, during its session in Geneva between February 11th - 15th 2002, to "resolve once and for all, this matter of Bakweri lands." After listening to Complainants, the delegation promised to faithfully report to the President of the Republic to take measures on the complaints of BLCC.

- On February 26, 2003, while on a business trip to Yaounde, the Secretary General of BLCC accepted an invitation to call on the leader of the February 6, 2003 delegation at his office in MINAT/D. There Mr. Ayissi showed him a copy of his report written in French to the President which bore the Presidential stamp acknowledging receipt. The Ayissi Report recommended to the President to open up negotiations with Complainants before the end of April so that the matter can be resolved before this Commission meets for its 33rd session in Niamey!

In the BLCC case, Cameroon's Head of State sat on Complainants' petitions for nine long years without taking any concrete action, occasionally punctuating this inaction by dispatching his envoys to meet with Complainants. In none of these forays did any of these presidential envoys ever suggest to Complainants that unless they complied with the exhaustion of domestic remedies requirement by citing the State before the Cameroon law courts, their matter would not be examined by the President of the Republic. In fact, the contrary impression was conveyed to Complainants who were given to believe that the Head of State was doing everything possible to resolve their problem. It is a little too

late now for the Government of Cameroon to invoke the exhaustion of domestic remedies rule to block the admissibility of this communication. Accordingly, Complainants urge this Commission to find, as the Inter-American Human Rights Court did in ***Cesar Chapparo Nivia et al.***, that Respondent's failure to timely raise the exhaustion rule amounts to a *tacit* waiver of this requirement.

III. CONCLUSION

For the reasons set forth above, Complainants submit that the remedies they have sought have proved, and that any remedies they may seek are likely to prove, ineffective. They respectfully request that the Commission:

1. Reject in its entirety the arguments contained in Respondent's Reply Memorial and declare *Communication 260/2002* admissible.

2. Find for Complainants that Respondent has violated their protected rights under the African Charter.

Respectfully submitted,

FOR AND ON BEHALF OF THE BAKWERI LAND CLAIMS COMMITTEE

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